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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

LESTER McDOUGHTERY,

Defendant and Appellant.

B289453

(Los Angeles County
Super. Ct. No. TA144991)

APPEAL from a judgment of the Superior Court of Los Angeles County, Eleanor J. Hunter, Judge. Affirmed and Remanded.

Lori A. Quick, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

In a trial at which defendant Lester McDougherty represented himself, a jury convicted him of two counts of criminal threats (counts 1 & 2; Pen. Code, § 422)¹ with use of a deadly weapon (a knife) (§ 12022, subd. (b)(1)), and two counts of assault with a deadly weapon, a knife (counts 4 & 7; § 245, subd. (a)(1)) in one of which he inflicted great bodily injury under circumstances involving domestic violence (§ 12022.7, subd. (e)).² He admitted a prior prison term allegation (§ 667.5, subdivision (b)),³ and a prior conviction of robbery as both a strike (§§ 667, subd. (b)–(j), 1170.12, subds. (a)–(d)) and a serious felony (§ 667, subd. (a).) The trial court sentenced him to a total term of 24 years, 4 months, including five years for the prior serious felony conviction under section 667, subdivision (a).

BACKGROUND

Prosecution Evidence

On the evening of December 22, 2017, defendant was at the ground-floor apartment of his girlfriend, Victoria Williams. Williams’

¹ All undesignated section references are to the Penal Code.

² The jury acquitted him of two counts charging false imprisonment by violence (§ 236).

³ Because on our initial review of the record it appeared that defendant had not admitted the section 667.5, subdivision (b) enhancement, we asked for supplemental briefing on the point. In response, respondent correctly informed us that defendant admitted the section 667.5, subdivision (b) allegation in a proceeding separate from the proceeding in which he admitted the other priors allegations. Defendant concedes that he admitted the section 667.5, subdivision (b) allegation.

sister, Vanessa Conley, was also present. According to Williams, the three of them were drinking alcohol and ingesting cocaine; however, Conley denied that they were using drugs. At one point, defendant became “paranoid” and told the women to “get in the closet.” He then turned off all the lights and went from room to room, looking out the windows. Conley, who had refused to get in the closet and said she did not like sitting in the dark, left the apartment. After she left, defendant moved the refrigerator so that it blocked the front door. He then accused Williams and Conley of setting him up to be attacked by gang members who were outside.

Williams was able to move the refrigerator, and Conley re-entered. Defendant then moved the refrigerator back to block the door. When Conley went to turn on a kitchen light, defendant ordered her not to do so. She replied that she was not going to sit in the dark, whereupon defendant struck her in the head, breaking her glasses. He then pulled out a knife from the back of his pants and tried to stab Conley in the stomach. To protect herself, Conley grabbed the knife blade, and two fingers of her left hand were cut. Williams grabbed the knife handle, and the three of them struggled over the weapon.

Conley and Williams tried to push the refrigerator away from the door, but defendant prevented them. He called the women “bitches,” accused them of “trying to set him up,” and said he was going to kill them. Defendant continued to thrust the knife towards the women.

Ultimately, the women were able to push the refrigerator from the door. Conley opened the front door a little bit and told Williams’ neighbor, Gregory McCloud, who had come out of his apartment after

being awakened by the sounds of the struggle, to call the police. Defendant then dropped the knife and went outside.

Conley and Williams went to McCloud's apartment, and the police and paramedics soon arrived. Los Angeles Police Officer Vanessa Contreras, one of the responding officers, recovered the knife used in the assault from McCloud, and arrested defendant, who was standing outside Williams' apartment and tried to walk away.

Conley later had surgery on her two injured fingers to repair severed tendons. At the time of trial, she could no longer bend the fingers.

According to Williams, defendant had numerous gang tattoos. Although he had lived with Williams for a time before the incident, he moved out after telling her that her apartment was in the area of a rival gang. Defendant would usually leave Williams' apartment early, because he said that his life would be in danger if he was in the area after sundown. On the night of defendant's assault, there were no gang members or other people outside Williams' apartment.

Defense Evidence

Defendant testified that on the evening of the incident, Williams invited him over because she had some cocaine. Defendant was suspicious because it was getting dark and she had never before invited him over at night. While defendant was on the bus to Williams' apartment, Williams called a couple of times asking where he was, which made defendant more suspicious.

Defendant arrived at the apartment around 7:00 p.m. Williams, Conley, and he were “partying and smoking crack and stuff” until about 12:30 a.m. Around that time, defendant noticed a “furtive movement” “on the patio,” and Conley made the comment, “Look at him, he’s hiding.” Someone was jiggling the patio door, and Williams said, “Oh, they’re working on the door.” Through the blinds, defendant saw someone on the patio, and immediately thought “they’re here to get me.” Conley declared, “I’ve never been a part of anything like this before.”

Defendant retrieved a knife from the kitchen, and placed it in the back of his pants. He wanted to call the police but was unable to find his phone. He turned off the lights so that he would not be visible from the patio. He saw two people on the patio, one of whom was jiggling the door. He placed the refrigerator in front of the front door and began pacing back and forth. He had already checked the windows and doors to make sure they were locked, as was his habit whenever he went to Williams’ apartment. Suddenly, he saw a “laser sight” come through a crack in the blinds. Appellant heard someone say “[i]f you sight in, put the barrel against the glass.” Conley then said “I hope they don’t shoot me.” She went to turn on a light and defendant pushed her away. When she resisted, appellant hit Conley in the face, saying “[m]an, you trying—you trying to get me killed in here.”

Because someone was “really jiggling the door,” appellant pulled the knife out, intending to run to the door, but Conley, apparently believing appellant was attacking her, grabbed the knife and they all started “tussling.” Defendant thought he would create a diversion by making the women scream to scare away the men on the patio, so he

said “I’m gonna kill both you bitches,” and pointed the blade towards Conley, making a conscious effort not to pull or push the knife because he did not want to injure Conley’s hand. As he planned, the women began screaming, and the three of them continued to “tussle.”

Defendant then saw the laser light moving around the inside of the apartment, and stooped up and down to avoid it. Eventually, defendant decided that the men on the patio had fled, so he let go of the knife, and allowed Williams and Conley to leave the apartment.

Defendant changed his bloody shirt, put on a burgundy hoodie, and stood outside the apartment. He did not want to go outside, believing he would be “a dead man,” but he thought it was better to be arrested than killed. Nonetheless, when the police arrived, defendant walked away from them. He did not attempt to talk to them and did not tell them about the rival gang members trying to kill him.

DISCUSSION

I. *Gang Expert*

Defendant contends that the trial court erred in denying his multiple requests for appointment of a gang expert. We disagree.

A. *Proceedings*

Defendant made four requests for the appointment of a gang expert: an ex parte request on February 28, 2018, approximately one month before trial; an oral motion on March 9, 2018, 17 days before the start of trial; an oral motion on March 23, 2018, before jury selection began that day; and a written motion on March 26, 2018, during trial.

The essence of defendant's showing in support of all the requests was the same. According to defendant, the prosecution evidence suggested that he had the delusion that rival gang members were about to attack him. However, defendant, who admitted he was a gang member, wanted to prove that he was not deluded, that there were gang members on the porch about to kill him, and that Williams and Conley had set him up to be killed by those gang members (or, perhaps, that he reasonably believed that they had set him up to be killed). In support of that theory, he wanted to call a gang expert to explain that Williams' apartment was in rival gang territory, and that he would be in danger if he were discovered there. The trial court denied the requests. In substance, the trial court reasoned that defendant had no evidence the persons he purportedly saw on the porch were, in fact, gang members, and that a gang expert could not testify that they were. Thus, a gang expert was not reasonably necessary to the defense.

In his opening statement, defendant told the jurors, "the truth of the matter is I'm a gang member, and I was under attack that night by rival gang members." In his closing argument, he argued that "basically everything they testified to occurred, and I admitted that on the stand." He argued that he had no intent to harm Williams or Conley (even though he believed "they were facilitating this particular event"), and that his motive was simply "trying to stay alive from these guys out here on this terrace."

B. Analysis

“An indigent defendant has a statutory and constitutional right to ancillary services reasonably necessary to prepare a defense.

[Citations.] The defendant has the burden of demonstrating the need for the requested services. [Citation.] The trial court should view a motion for assistance with considerable liberality, but it should also order the requested services only upon a showing they are reasonably necessary. [Citation.] On appeal, a trial court’s order on a motion for ancillary services is reviewed for abuse of discretion. [Citations.]”

(*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1255.)

Here, defendant failed to make a showing that a gang expert was reasonably necessary. As the trial court reasoned, there was no evidence to suggest that the people defendant purportedly saw on the porch were members of a rival gang, or that they possessed a gang-related motive to kill defendant. Thus, any opinion by a gang expert regarding the purported danger defendant faced if found at Williams’ apartment in rival gang territory was irrelevant—it had no evidentiary tether to the trial evidence.

Moreover, the evidence at trial conclusively demonstrated that a gang expert was not reasonably necessary. Defendant did not need an expert to testify that he was (or reasonably believed he was) in danger: according to defendant, one of the people on the porch was using a laser sight to zero in on him, and defendant heard someone say “[i]f you sight in, put the barrel against the glass.” Obviously, regardless of any testimony from a gang expert, defendant’s description of events (if

believed) would establish a reasonable (or perhaps unreasonable) belief he was in danger.

As for defendant's desire to give a gang overtone to the danger he perceived (even though there was no evidence that the people allegedly on the porch were rival gang members), Williams testified that defendant had lived with her for a time before the incident, but moved out after telling her that her apartment was in the area of a rival gang. Further, Williams testified that defendant would usually leave her apartment early, because he said he did not want to be in the area after sundown because his life would be in danger. Also, defendant testified to the danger from rival gang members. Thus, the jury heard evidence regarding defendant's fear about being in the area of Williams' apartment.

For all these reasons, the trial court's ruling was sound; a gang expert was not reasonably necessary to the defense.

Amendment of Abstract

In count 7, defendant was convicted of assault with a deadly weapon on Conley (§ 245, subd. (a)(1)), with a true finding that he inflicted great bodily injury under circumstances involving domestic violence (§ 12022.7, subd. (e)). The trial court imposed the upper term of five years for the section 12022.7, subdivision (e) enhancement. However, the abstract of judgment erroneously reflects that the enhancement was imposed under section 12022.7, subdivision (b). The parties agree, as do we, that the abstract of judgment must be amended to reflect that the enhancement was imposed under subdivision (e).

Remand

Defendant contends that he is entitled to a remand for the trial court to exercise its discretion whether to strike the section 667, subdivision (a) enhancement. We agree.

Effective January 1, 2019 (after defendant's sentencing), Senate Bill No. 1393 deleted former subdivision (b) of section 1385, which precluded the trial court from striking the five-year enhancements for defendant's prior serious felony convictions under section 667, subdivision (a). With the deletion of subdivision (b) of section 1385, the trial court now has such discretion. Defendant's case is not final on appeal, and therefore he is entitled to the ameliorative effect of the enactment. Further, a remand is appropriate. In the analogous situation involving the enactment of Senate Bill No. 620, which gave the trial court discretion to strike firearm enhancements under section 12022.5 and 12022.53, courts have held that a remand to allow the trial court to exercise that discretion "is required unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so. [Citation.] Without such a clear indication of a trial court's intent, remand is required when the trial court is unaware of its sentencing choices." (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110; see *People v. McDaniels* (2018) 22 Cal.App.5th 420, 426-428; *People v. Chavez* (2018) 22 Cal.App.5th 663, 713.) Here, the record contains no clear indication of the trial court's intent. Therefore, a remand is appropriate. We express no opinion on how the court should rule. We

note only: (1) the court’s decision must be “in strict compliance with section 1385(a)” (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530), and (2) under the full resentencing rule, should the court decide to strike one or both of the section 667, subdivision (a) priors, it is entitled to reconsider its other prior sentencing choices (see *People v. Buycks* (2018) 5 Cal.5th 857, 893).

DISPOSITION

The convictions are affirmed. The matter is remanded for the trial court, at a proceeding at which defendant is present and represented by counsel (unless waived), to exercise its discretion whether to strike the section 667, subdivision (a) enhancement. Further, the abstract of judgment shall be amended to reflect that the enhancement on count 7 is imposed pursuant to section 12022.7, subdivision (e). In all other respects, the judgment is affirmed.

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WILLHITE, J.

We concur:

MANELLA, P. J.

COLLINS, J.